

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
	)	
Petition of the SBC ILECs for a	)	
Declaratory Ruling That UniPoint	)	
Enhanced Services, Inc. d/b/a	)	WC Docket No. 05-276
PointOne and Other Wholesale	)	
Transmission Providers Are Liable For	)	
Access Charges	)	
	)	
	)	
Petition for Declaratory Ruling that VarTec	)	
Telecom, Inc. Is Not Required to Pay	)	
Access Charges to Southwestern Bell	)	
Telephone Company or Other Terminating	)	
Local Exchange Carriers When Enhanced	)	
Service Providers or Other Carriers Deliver	)	
the Calls to Southwestern Bell Telephone	)	
Company or Other Local Exchange	)	
Carriers for Termination	)	

**COMMENTS OF EARTHLINK, INC.**

EarthLink, Inc., by its attorneys and pursuant to the Commission's Public Notice,<sup>1</sup> files these comments on the above-captioned SBC Petition<sup>2</sup> and VarTec Petition<sup>3</sup> concerning the application of incumbent local exchange carrier ("ILEC") access charges to IP-enabled communications. EarthLink is among the largest independent broadband

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<sup>1</sup> FCC Public Notice, DA 05-2514 (rel. Sept. 26, 2005).

<sup>2</sup> Petition of the SBC ILECs for a Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges (filed Sept. 21, 2005) ("SBC Petition").

<sup>3</sup> Petition for Declaratory Ruling that VarTec Telecom, Inc. Is Not Required to Pay Access Charges to Southwestern Bell Telephone Company or Other Terminating Local Exchange Carriers When Enhanced Service Providers or Other Carriers Deliver the Calls to Southwestern Bell Telephone Company or Other Local Exchange Carriers for Termination (filed Aug. 20, 2004) ("VarTec Petition").

Internet Service Providers (“ISPs”) in the United States today. EarthLink provides Internet services to over 5.5 million customers, including high-speed Internet access, Voice over Internet Protocol (“VoIP”), and other IP-enabled services. As such, EarthLink has an interest in this declaratory ruling proceeding.

### **INTRODUCTION AND SUMMARY**

EarthLink believes the Commission should address the issues raised by the SBC and VarTec Petitions in a considered and narrow manner, applying *existing* FCC law and precedent. Thus, while EarthLink believes it is not appropriate now to comment on the merits of any party’s particular position, at least until all the facts of the opposing parties have been set out, there are settled legal precedents the Commission must apply to each declaratory ruling.

First, the *AT&T IP In the Middle Order*<sup>4</sup> is predicated on a narrow set of facts and applies only to one narrow type of IP service; by its terms, it does not apply to the array of other IP-enabled services that exist in today’s marketplace. Second, FCC law is clear that ILECs may assess access charge liability only on connecting carriers that take ILEC access services under tariff and/or contract. Thus, ILEC “self help” measures of threatening protracted litigation against and blocking traffic of entities that do not owe access charges under existing law should be deemed by the Commission to be unreasonable and unjust practices that are inconsistent with the Communications Act.

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<sup>4</sup> *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd. 7457, ¶12 (2004) (“*AT&T IP In the Middle Order*”).

**I. The FCC Should Apply Existing Law To Settle The Declaratory Ruling Issues.**

In addressing the SBC and VarTec Petitions, the Commission's primary duty here is to apply the existing law, and not to break new policy or regulatory ground. As the Commission has explained, a declaratory ruling proceeding is "an adjudication, not a rulemaking under the [APA] . . . . The Commission rule that authorizes us to issue declaratory rulings specifically cites the adjudication provision of the APA as its source of authority. *See* 47 C.F.R. § 1.2 (citing 5 U.S.C. § 554)."<sup>5</sup>

There are, of course, significant other ongoing proceedings that address whether, on a prospective basis, the Commission should modify its regulations and apply access charges or intercarrier compensation requirements for IP-enabled providers.<sup>6</sup> These rulemaking proceedings are appropriately comprehensive and are intended to consider a host of different IP-enabled services and what pricing regimes will best ensure a fair and efficient compensation to promote IP-enabled services. That broader inquiry is not, however, the subject of this proceeding. EarthLink urges the Commission to refrain from engaging in policymaking or rulemaking in this proceeding that is already ongoing in other dockets.

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<sup>5</sup> *See In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges, Declaratory Ruling*, 17 FCC Rcd. 13192, ¶ 20 n. 51 (2002) (finding that "under our existing rules" Sprint PCS was not prohibited from charging access charges to AT&T, but AT&T was not required to pay such charges without a contractual obligation to do so. The FCC noted that it would address any prospective changes to CMRS and IXC interconnection requirements in a pending rulemaking proceeding.). *Id.* ¶¶ 1, 20 n. 51. *See, also, Central Texas Telephone Coop. v. FCC*, 402 F.3d 205, 210 (D.C. Cir. 2005); *Radiofone v. FCC*, 759 F.2d 936, 939 (D.C. Cir. 1985).

<sup>6</sup> *See e.g., In the Matter of IP-Enabled Services, Notice of Proposed Rulemaking*, 19 FCC Rcd. 4863 (2004); *In the Matter of Developing a Unified Intercarrier Compensation Regime, Further Notice of Proposed Rulemaking*, 20 FCC Rcd. 4685 (2005).

## **II. FCC's *AT&T IP In the Middle Order* Applies Only to a Narrow Set of IP-Enabled Communications.**

As noted in the SBC Petition, the FCC's *AT&T IP In the Middle Order* is settled FCC precedent. In that proceeding, the FCC explained that AT&T's service was a "telecommunications service" offering interstate communications and, as such, it was subject to the originating and terminating access charges when the service terminated voice calls on an ILEC's public switched network.

Importantly, the FCC carefully limited the scope of its ruling to the precise type of service being offered by AT&T. Thus, the Commission found that AT&T's service was not an information service under the "net protocol conversion" test due to the fact that the information sent and received by end-users was in identical protocol, and the only protocol conversions were "internetworking" conversions taking place entirely within AT&T's network.<sup>7</sup> In fact, the end user traffic originated in the ILEC protocol (e.g., TDM), went through the ILECs' circuit switches and, ultimately, terminated via another ILEC switch in the ILEC protocol (e.g., TDM) at the called party premises. Thus, in that case, the Commission ruled that the "internetworking exception" applied and the AT&T service was not an "information service." Even setting aside the net protocol conversion matter, the FCC expressly limited the *AT&T IP In the Middle Order* to a service offering that "originates and terminates on the public switched telephone network (PSTN)" and that "provide[s] no enhanced functionality to end users due to the IP technology."<sup>8</sup>

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<sup>7</sup> *AT&T IP In the Middle Order*, ¶12.

<sup>8</sup> *Id.* ¶ 1.

To the extent that SBC has requested that the FCC simply apply the *AT&T IP In the Middle Order*,<sup>9</sup> the Commission should not address the application of existing access charge regulations to other IP-enabled providers that offer services markedly dissimilar to AT&T's service. To minimize industry confusion, however, the Commission's decision in this proceeding should further emphasize that its ruling does not apply to other IP-enabled services distinct from the AT&T "IP-In-the-Middle" type service. As the Commission has recognized, there are many iterations of VoIP. For example, EarthLink has recently launched VoIP services to end users that would not be subject to ILEC access charges under existing law and that are significantly different from the service considered in the *AT&T IP In the Middle Order*.<sup>10</sup> Because many VoIP services are truly distinct from the AT&T service that "provide[d] no enhanced functionality to end users

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<sup>9</sup> SBC Petition at i.

<sup>10</sup> EarthLink currently offers wireline VoIP services via broadband connections (i.e., DSL or cable modem service), and will offer a line-powered voice ("LPV") service via connections purchased from Covad Communications. In both cases, the connection goes directly to a DSLAM and the signal does not traverse a PSTN switch on the originating end of an EarthLink subscriber call, unlike the AT&T service. *Compare AT&T IP In the Middle Order*, ¶ 1 (AT&T's service "originates and terminates on the public switched telephone network (PSTN)"). The EarthLink service also offers a "net protocol conversion" of voice IP communications to TDM protocol for subscribers who wish to call a PSTN end user. *See also, Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003) ("[t]he process of transmitting customer calls over the Internet requires Vonage to 'act on' the format and protocol of the information. 47 C.F.R. § 64.702(a). For calls originating with one of Vonage's customers, calls in the VoIP format must be transformed into the format of the PSTN before a POTS user can receive the call. For calls originating from a POTS user, the process of acting on the format and protocol is reversed. The Court concludes that Vonage's activities fit within the definition of information services."). Further, EarthLink's VoIP services are managed using Sessions Initiation Protocol ("SIP") to offer subscribers a host of enhanced functionalities that combine voice and data services into an integrated voice-based information service offering.

due to the IP technology,"<sup>11</sup> and have other service-specific characteristics that are not addressed by the *AT&T IP In the Middle Order*, the FCC should not address them here.

**III. Under Existing Law, Only Interconnecting Carriers Owe ILEC Per-Minute "Carrier's Carrier Charges".**

The VarTec Petition asserts that VarTec originates but does not terminate certain voice calls; that it has not subscribed to any ILEC access service; and that it "has no contractual or other relationship" with terminating ILECs for calls originated by VarTec. Instead, VarTec asserts that it passes originating traffic off to "enhanced service providers and . . . other carriers to complete the calls."<sup>12</sup> While EarthLink, of course, cannot verify these factual statements, it follows under existing FCC precedent that, if the VarTec assertions are true, then VarTec is correct that it owes no access charges to the terminating ILECs.<sup>13</sup>

The FCC's rules clearly state that "[c]arrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services."<sup>14</sup> The Commission's rules also make clear that only connecting carriers that purchase access services and entrance facilities under the ILEC's tariffed offering are subject to per-

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<sup>11</sup> *AT&T IP In the Middle Order*, ¶ 1.

<sup>12</sup> VarTec Petition, at 2, 3.

<sup>13</sup> As the Commission has previously explained, "[t]here are three ways in which a carrier seeking to impose charges on another carrier can establish a duty to pay such charges: pursuant to (1) Commission rule; (2) tariff; or (3) contract." *In the Matter of Petitions of Sprint PCS and AT&T Corp. For Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192, ¶ 8 (2002). The VarTec Petition discusses at length that SBC's tariffs establish no obligation for VarTec to pay access charges, and EarthLink will not repeat those arguments here.

<sup>14</sup> 47 C.F.R. § 69.5(b).

minute carrier's carrier charges. For example, under the FCC rules, ILECs establish and enforce carrier's carrier charges through the offering of access services under tariff;<sup>15</sup> as part of that service, ILECs offer entrance facilities in order that carriers agreeing to the terms of the ILEC's access tariffs may physically interconnect their PoPs with the ILEC facilities.<sup>16</sup>

Thus, unless an entity purchases ILEC access services and routes traffic across those services, that entity is not liable under existing law for the payment of access charges to an ILEC.<sup>17</sup> As the Commission explained in the *AT&T IP In the Middle Order*, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, *the interexchange carrier is obligated to pay terminating access charges.*"<sup>18</sup> Nor may an ILEC assert, as a form of "self-help," that entities or carriers not purchasing its access service or directly exchanging traffic with the ILEC are somehow vicariously liable to the ILEC for debts that the ILEC has failed to collect from its connecting carriers.

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<sup>15</sup> See, e.g., 47 C.F.R. §§ 69.4(b)(setting forth the elements to be included in all ILEC access tariffs).

<sup>16</sup> 47 C.F.R. § 69.110(a) (describing entrance facilities as "the telephone company facilities between the interexchange carrier or other person's point of demarcation and the serving wire center").

<sup>17</sup> Of course, an entity may also be liable if it commits fraud with respect to the nature of the traffic being exchanged with a terminating ILEC, e.g., an interexchange carrier falsely asserts that intrastate toll traffic is interstate toll traffic or that interexchange traffic is local traffic. That is apparently, however, a different set of facts from that presented in the VarTec Petition.

<sup>18</sup> *AT&T IP In the Middle Order*, ¶ 19 (emphasis added).

Indeed, the Commission should clarify that ILEC “self-help” measures in the name of “access charge” recovery against third-parties that have no access service relationship with the ILEC are anti-competitive tactics designed to thwart voice competition and as such are “unreasonable practices” under the Communications Act.<sup>19</sup> For example, ILEC threats of protracted litigation against much smaller VoIP competitors based on specious claims of access charge obligations deter VoIP deployment and raise ILEC rivals’ costs beyond what the law entitles for the ILEC. Such bullying practices also threaten public safety and are an impediment to the Commission’s goals for the deployment and adoption of advanced services and, ultimately, for the emergence of voice competition beneficial for all consumers.<sup>20</sup>

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<sup>19</sup> 47 U.S.C. § 201(b).

<sup>20</sup> *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶ 2 (2004) (CLEC/IXC access charge disputes cause significant financial instability for all providers involved and “appeared likely to threaten network ubiquity, a result that the Commission concluded could have significant public safety ramifications.”).

November 10, 2005

**CONCLUSION**

For the forgoing reasons, EarthLink urges the Commission to apply existing law to resolve the SBC Petition and the VarTec Petition, and to do so in a manner that reflects that many IP-enabled services today are not subject to the current ILEC access charge system.

Respectfully submitted,

/s/

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November 10, 2005

## **CERTIFICATE OF SERVICE**

I, Sybil Anne Strimbu, state that copies of the foregoing *Comments of EarthLink, Inc.* were submitted electronically (\*) and sent via regular mail, this day, Thursday, November 10, 2005, to the following:

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